Specialized Procedures Governing Preliminary Examinations and Trials

6

6.1 Chapter Overview

This chapter explores various procedures that a court may use in sexual assault cases. Some of these procedures deal with closing the courtroom and protecting victims, witnesses, and defendants from embarrassment, intimidation, and potentially violent encounters while testifying or while outside the courtroom. Included is information on sequestration rights, separate waiting areas, special protections for victims and witnesses, gesturing and reenactment, and confidentiality concerns.

Others topics discussed in this chapter deal with speedy trial rights, a defendant's right to self-representation, and the ordering of a defendant to undergo testing and counseling for various communicable diseases, including venereal disease, hepatitis, and HIV. The last section of this chapter discusses potential issues that can be explored in voir dire to ensure that a jury panel does not harbor misconceptions about the nature of sexual assault, sexual assault laws, and the behavior and characteristics of alleged sex offenders and victims.

6.2 Closing Courtrooms to the Public

This section discusses the circumstances under which a judge may close the courtroom to the public. Three types of proceedings are covered: preliminary examinations, criminal trials, and proceedings pertaining to juvenile delinquency matters.

A. Preliminary Examinations in Cases Involving Sexual Misconduct

In a case where the defendant is charged with criminal sexual conduct (in any degree), assault with intent to commit criminal sexual conduct, sodomy, gross indecency, or any other offense involving sexual misconduct, the court may close a preliminary examination to the public on motion of a party if the following conditions are met:

> "(a) The magistrate determines that the need for protection of a victim, a witness, or the defendant outweighs the public's right of access to the examination.
>
> "(b) The denial of access to the examination is narrowly tailored to accommodate the interest being protected.
>
> "(c) The magistrate states on the record the specific reasons for his or her decision to close the examination to members of the general public." MCL 766.9(1)(a)-(c).

To determine whether closure of the preliminary examination is necessary to protect a victim or witness, as required in MCL 766.9(1)(a), the court must consider:

> "(a) The psychological condition of the victim or witness.
>
> "(b) The nature of the offense charged against the defendant.
>
> "(c) The desire of the victim or witness to have the examination closed to the public." MCL 766.9(2)(a)-(c).

The statute further provides that a court may close a preliminary examination to protect the right of a party to a fair trial only if both of the following apply:

> "(a) There is a substantial probability that the party's right to a fair trial will be prejudiced by publicity that closure would prevent.
>
> "(b) Reasonable alternatives to closure cannot adequately protect the party's right to a fair trial." MCL 766.9(3)(a)-(b).

Denial of access to the preliminary examination must be narrowly tailored to accommodate the interest being protected. MCL 766.9(1)(a)-(b).

Before closing a preliminary examination to the public, a magistrate must state the specific reasons for the decision on the record. MCL 766.9(1)(c). In narrowly tailoring the closure under MCL 766.9 to accommodate the interests of a victim testifying about sensitive matters, the magistrate should only close those portions of the examination in which such matters are discussed. *In re Closure of Preliminary Examination (People v Jones)*, 200 Mich App 566, 569-570 (1993).

B. Criminal Trials

A criminal trial must be open to the public, unless the trial court finds that no alternative short of closure will adequately assure a fair trial for the accused. *Richmond Newspapers, Inc v Virginia*, 448 US 555, 580-581 (1980).*

*See Section 6.5 for limitations on a court's authority to sequester witnesses, and Section 6.7 for provisions that protect witnesses.

A defendant's Sixth Amendment right to a public trial extends to pretrial suppression hearings. *Waller v Georgia*, 467 US 39, 43-47 (1984).

The United States Supreme Court in *Sheppard v Maxwell*, 384 US 333, 358-363 (1966) has held that to impose a gag order or to close the proceedings to the public and press, a trial court must first consider the following alternatives:

*See Section 6.3.

*See Section 6.5.

- Adoption of stricter rules governing use of the courtroom by reporters.*
- Insulation or sequestration of witnesses.*
- Regulation of the release of information to the press by law enforcement personnel, witnesses, or counsel.
- A court order proscribing extrajudicial statements by any law enforcement personnel, party, witness, or court official which divulges prejudicial matters.
- Continuance of the case until the threat of news prejudicial to defendant's fair trial rights abates.
- Change of venue.
- Sequestration of the jury.

Parties to a criminal trial may not, by mere agreement, empower a judge to exclude the public and press from a session of the court, and the defendant cannot waive his or her Sixth Amendment right to public trial in absolute derogation of the public interest in seeing that justice is administered openly and publicly. See *Detroit Free Press v Macomb Circuit Judge*, 405 Mich 544, 546, 549 (1979); and *Detroit Free Press v Recorder's Court Judge*, 409 Mich 364, 385-393 (1980). On the rare occasion when closure may be appropriate, the court must exercise its discretion to balance the fundamental principle of open trials with the specific unusual circumstances that allegedly endanger a fair trial. *Id*. at 390. The size of the courtroom may justify limiting attendance, and it is not impermissible to exclude members of the public who create disturbances or are dangerous. *Id*. at 386-387. Closure orders must be narrowly tailored to the circumstances of the case. See *In re Closure of Jury Voir Dire (People v Lawrence)*, 204 Mich App 592, 595 (1994); and *People v Kline*, 197 Mich App 165, 171 (1992).

A party who seeks to exclude the public from a sexual misconduct trial bears a heavy burden to show a substantial probability that prejudicial error depriving the defendant of a fair trial will result if the case is open to the press and public, a substantial probability that closure will be effective in dealing with the danger, and a substantial probability that no alternative to closure exists that would protect the defendant's right to a fair trial. *Detroit Free Press v Recorder's Court Judge*, *supra* at 390 (1980). See also *Kline*, *supra* at 169.

A criminal trial must be open to the public unless the trial court enters findings that no alternative short of closure will adequately assure a fair trial for the defendant. *Richmond Newspapers*, *Inc*, *supra* at 580-581. In determining if there is a right of access to criminal proceedings, the courts examine whether the place and process at issue have historically been open to the press and general public, and whether public access plays a significant positive role in the functioning of the process in question. *In re People v Atkins*, 444 Mich 737, 739-740 (1994).

This presumption of openess also applies to the jury selection process. In *Press-Enterprise Co v Superior Court*, 464 US 501 (1984), the United States Supreme Court, in reversing the trial court's decision to close six weeks of voir dire proceedings to the public in a rape and murder trial of a teenage girl, stated the following regarding the presumption of openness:

> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id*. at 510.

However, the Supreme Court noted that questions to jurors that give rise to disclosures of sensitive information may mandate closure of the jury selection process:

> "Some questions may have been appropriate to prospective jurors that would give rise to legitimate privacy interests of those persons. For example a prospective juror might privately inform the judge that she, or a member or her family, had been raped but had declined to seek prosecution because of the embarassment and emotional trauma from the very disclosure of the episode. The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process." *Id*. at 512.

See also *In re Closure of Voir Dire*, 204 Mich App 592, 595-596 (1994) (reversed trial court's order of closure of jury selection as not narrowly tailored to the particular circumstances of the case).

MCL 600.1420 permits a court, for good cause shown, to exclude witnesses from the courtroom when they are not testifying. This statute also permits a court, in cases involving scandal or immorality, to exclude minors who are not parties or witnesses.*

*See Section 6.5 for more information on witness sequestration.

C. Juvenile Delinquency Proceedings

MCR 5.925(A)(1) provides generally that all juvenile court proceedings on the formal calendar and all preliminary hearings shall be open to the public. However, MCL 712A.17(7) and MCR 5.925(A)(2) allow the court to close proceedings to the general public under limited circumstances. On motion of a party or a victim, the court may close proceedings to the public during the testimony of a juvenile witness or a victim to protect the welfare of the juvenile witness or victim. If such closure is mandated, the court must close the courtroom to all people except those who are legally necessary, i.e., the

*See Section 6.7(F) for limitations on a defendant's right to be present; see Section 6.5 for limitations on a court's authority to sequester witness

attorneys, the defendant, and certain witnesses.* In making such a determination, the court must consider:

- The age and maturity of the juvenile witness or the victim;
- The nature of the proceedings; and
- The desire of the juvenile witness, of the juvenile witness' family or guardian, or of the victim to have the testimony taken in a room closed to the public.

For purposes of MCL 712A.17(7), a "juvenile witness" does not include the juvenile against whom the proceeding is brought for a criminal offense. MCL 712A.17(8) and MCR 5.925(A)(2).

If a hearing is closed under MCL 712A.17(7), the records of that hearing shall only be open by order of the court to persons having a legitimate interest.* MCL 712A.28(2).

*See Miller, *Crime Victim Rights Manual*, (MJI, 2001), Section 5.9(B), for the criteria to determine who has "a legitimate interest."

6.3 Limitations on Film or Electronic Media Coverage in Courtrooms

By Administrative Order No. 1989-1, 432 Mich cxii (1989), the Michigan Supreme Court ruled that film or electronic media coverage is permitted in all Michigan courts. With limited exceptions, a request for film or electronic media coverage must be allowed if the request is made at least *three business day*s before the beginning of the proceeding to be filmed. *Id.* at 2(a).

Under AO 1989-1, a court may terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding of either of the following:

- The fair administration of justice requires such action; or
- There has been a violation of the rules established under AO 1989-1 or of additional rules imposed by the judge.

A court's decision in applying AO 1989-1 is not appealable. Also, a judge has sole discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, and relocated witnesses. *Id.* at Part 2(b), (d). A judge may bar coverage of jurors and jury selection, and may require members of the media to make pooling arrangements on their own and, in the absence of such arrangements, to bar media coverage. *Id.* at Part 2(c), 4(d).

6.4 Speedy Trial Rights

This section discusses the speedy trial rights of both criminal defendants and crime victims.

A. Defendant's Right to Speedy Trial

1. Constitutional Right to Speedy Trial

A criminal defendant's right to a speedy trial* is guaranteed by US Const, Am VI and XIV; Const 1963, art 1, § 20; MCL 768.1; and MCR 6.004. *People v Mackle*, 241 Mich App 583, 602 (2000). To determine whether a defendant has been denied his or her right to a speedy trial, a court must balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her speedy trial right; and (4) prejudice to the defendant. See *Barker v Wingo*, 407 US 514, 530 (1972); and *People v Gilmore*, 222 Mich App 442, 459 (1997). "Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice." MCR 6.004(A), as amended, effective January 1, 2006.

*For a juvenile's right to speedy trial, see Miller, *Juvenile Justice Benchbook* (MJI, 1998), Sections 11.17-11.19.

A delay under 18 months requires the defendant to prove that he or she suffered prejudice. *People v Cain*, 238 Mich App 95, 112 (1999). A delay of 18 months or more is presumed prejudicial and the prosecutor has the burden to rebut that presumption. *Id*. There are two types of prejudice for a defendant awaiting trial: (1) prejudice to the person (e.g., pretrial incarceration depriving an accused of civil liberties); and (2) prejudice to the defense, which is the more crucial of the two types of prejudice. *Gilmore*, *supra* at 461-462. See also *People v Ovegian*, 106 Mich App 279, 284-285 (1981) ("Pretrial incarceration is always 'prejudicial' in that the accused is denied many of his civil liberties. . . . Of the two types of prejudice the defendant may experience while awaiting trial, prejudice to his defense is considered the more crucial").

All periods of delays are attributable to the prosecutor or defendant. *People v Ross*, 145 Mich App 483, 491 (1985). Delays inherent in the court system, including those attributed to docket congestion, are attributed to the prosecutor but are assigned minimal weight. *Gilmore*, *supra* at 460. Delays caused by adjudication of defense motions are attributable to the defendant. *Id*. at 461. Ordinarily, "delays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned[,]" because "assigned counsel generally are not state actors for purposes of a speedy-trial claim." *Vermont v Brillon*, 556 US ___, ___ (2009). However, it is possible that an assigned counsel's delay could be charged to the state if a breakdown in the public defender system caused the delay. *Id*. at ___.

For more information on a defendant's constitutional right to a speedy trial, see *Criminal Procedure Monograph 6: Pretrial Motions—Third Edition* (MJI, 2006-2008), Section 6.41.

2. The 90-Day Rule Governing Select Felony and "Violent Felony" Charges

*See Section 6.4(A)(3) for a discussion of delays.

Under MCR 6.106(B)(3), a defendant who is denied pretrial release as provided in MCR 6.106(B)(1) for any of the following charges must be afforded a trial within 90 days after the date of the court's order denying pretrial release, excluding delays* attributable to the defense, unless the court immediately schedules a hearing and sets an amount of bail:

- Murder.
- Treason.
- First-degree criminal sexual conduct.
- Armed robbery.
- Kidnapping with the intent to extort money or other valuable thing thereby.
- A "violent felony"* and:

> "[A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or
>
> "[B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of the United States or another state arising out of separate incidents." MCR 6.106(B)(1)(a)(ii).

*A "violent felony" is a felony that contains an element involving "a violent act or threat of a violent act against any other person." MCR 6.106(B)(2).

For more information on denying pretrial release and bond, see Section 5.3.

3. 180-Day Rule for Defendants Not in Custody of Department of Corrections

*As amended, effective January 1, 2006.

Unless the court determines, by clear and convincing evidence, that the defendant presents a danger to the community or any other person, or that the defendant is likely to fail to appear for future proceedings, MCR 6.004(C) requires that a defendant be released on personal recognizance after he or she has been incarcerated for a certain period of time.* Specifically, MCR 6.004(C) requires that a defendant in a felony case be released on personal recognizance after being incarcerated for 180 days or more (to answer for the same crime, a crime based on the same conduct, or a crime arising from the same criminal episode). *Id.* In a misdemeanor case, the defendant must be released on personal recognizance after being incarcerated for 28 days or more (to answer for the same crime, a crime based on the same conduct, or a crime arising from the same criminal episode). *Id*. Pursuant to MCR 6.004(C)(1)–(6), the following periods of delay must be excluded in computing the 180-day or 28-day periods:

> "(1) periods of delay resulting from other proceedings concerning the defendant, including but not limited to competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges,
>
> "(2) the period of delay during which the defendant is not competent to stand trial,
>
> "(3) the period of delay resulting from an adjournment requested or consented to by the defendant's lawyer,
>
> "(4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either
>
> > "(a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date; or
> >
> > "(b) exceptional circumstances justifying the need for more time to prepare the state's case,
>
> "(5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, but only if good cause exists for not granting the defendant a severance so as to enable trial within the time limits applicable, and
>
> "(6) any other periods of delay that in the court's judgment are justified by good cause, but not including delay caused by docket congestion."

4. The 180-Day Rule for Defendants in Custody of Department of Corrections

Except for the crimes exempted by MCL 780.131(2),* MCR 6.004(D)(1) requires a prosecutor to bring an inmate to trial within 180 days after the Department of Corrections notifies the appropriate prosecuting attorney of the inmate's location and requests final disposition of the pending matter. Specifically, MCR 6.004(D)(1) requires that an inmate be brought to trial within 180 days

> "after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be

*Crimes committed by an inmate during incarceration or during an escape from incarceration.

*MCR 6.004(D)(1), as amended, effective January 1, 2006.

> accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail."*

MCR 6.004(D)(2) specifies the remedy for 180-day rule violations:

> "In the event that action is not commenced on the matter for which request for disposition was made as required in subsection (1), no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information, or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."*

*MCR 6.004(D)(2), as amended, effective January 1, 2006.

The purpose of the 180-day rule is to give inmates the opportunity to have "'sentences run concurrently consistent with the principle of law disfavoring accumulations of sentences.'" *People v Smith*, 438 Mich 715, 718 (1991), quoting *People v Loney*, 12 Mich App 288, 292 (1968). A person whose status is that of a pretrial detainee or a person being detained locally under a parole hold cannot invoke the 180-day rule. See *People v Chambers*, 439 Mich 111, 115-116 (1992); *Chavies*, *supra* at 279-280; and *People v Wright*, 128 Mich App 374, 378-379 (1983). A person whose conviction has been reversed or otherwise set aside but who nonetheless remains in the custody of the Department of Corrections, albeit not pursuant to any conviction and sentence, may not invoke the 180-day rule. *Chambers*, *supra*.

*Overruled to the extent of its inconsistency with MCL 780.131.

In *People v Cleveland Williams*, 475 Mich 245, 248 (2006), the Michigan Supreme Court, contrary to *People v Smith*, 438 Mich 715 (1991),* ruled that MCL 780.131 "contains no exception for charges subject to consecutive sentencing." Consequently, unless specifically excepted under MCL 780.131(2), the 180-day rule applies to *any* untried charge against *any* prisoner, without regard to potential penalty. According to the Court, the plain language of MCL 780.131 permits a prisoner subject to mandatory consecutive sentencing to assert his right to a speedy trial. However, that the defendant in this case was entitled to raise the speedy trial issue did not end the Court's review of this case. After concluding that the defendant raised a valid claim under MCL 780.131, the Court considered the delay in bringing the defendant to trial and determined that the defendant's speedy trial rights had not been violated. *Cleveland Williams, supra* at 266.

In addition to the defendant's speedy trial claim, the Court addressed specific case law that incorrectly interpreted the statutory language governing the notice required to trigger application of the statute. Contrary to *People v Hill*, 402 Mich 272 (1978), and *People v Castelli*, 370 Mich 147 (1963),* the Court noted that the statutory time period of 180 days begins to run when the prosecution receives notice from the Department of Corrections:

**Hill* and *Castelli* were overruled to the extent of their inconsistency with MCL 780.131.

> "The statutory trigger is notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges. The statute does not trigger the running of the 180-day period when the Department of Corrections actually learns, much less should have learned, that criminal charges were pending against an incarcerated defendant." *Cleveland Williams, supra* at 260.

For more information on the 180-day rule, see Kolenda, Fielding, & Miller, Monograph 6*: Pretrial Motions—Revised Edition* (MJI, 2001), Section 6.43.

B. Crime Victim's Right to Speedy Trial

In addition to a criminal defendant's right to a speedy trial, certain crime victims have a right to a speedy trial. For felonies in the criminal civision of circuit court, MCL 780.759 provides that, upon motion of the prosecutor declaring a victim to be (or have) any of the following, the chief judge must schedule a hearing within 14 days of the motion filing date, and, if the motion is granted, a trial *not earlier than 21 days* from the hearing date:

- A victim of child abuse, including sexual abuse or any other assaultive crime.
- A victim of first-, second-, or third-degree criminal sexual conduct.
- A victim of assault with intent to commit criminal sexual conduct involving penetration or assault with intent to commit second-degree criminal sexual conduct.
- A victim who is sixty-five years old or older.
- A victim with a disability inhibiting the ability to attend court or participate in the proceedings.

A substantially similar provision exists for felonies and serious misdemeanors in delinquency proceedings. MCL 780.786a. For serious misdemeanors in district court, MCL 780.819 provides that "[a]n expedited trial may be scheduled for any case in which the victim is averred by the prosecuting attorney to be a child." A "serious misdemeanor" is defined under MCL 780.811(1)(a) and includes the following sex-related misdemeanor offenses: violations of MCL 750.335a (indecent exposure) or of a local ordinance substantially corresponding to MCL 750.335a.

6.5 Sequestration of Victims and Witnesses

This section discusses a court's authority to order the sequestration of victims and witnesses from the courtroom, including sanctions for noncompliance.

A. Court Proceedings Generally

1. Witnesses (Excluding Crime Victims)

*MCL 766.10 contains similar provisions for sequestering witnesses during preliminary examinations.

Under the Revised Judicature Act, pursuant to MCL 600.1420, a court, for good cause shown, has the authority to sequester witnesses from the courtroom to discourage collusion.* Additionally, under MRE 615, a court may exclude nonparty witnesses from the courtroom at the request of a party or on its own motion. Sequestration requests are within the trial court's discretion and are ordinarily granted. See *People v Cutler*, 73 Mich App 313, 315 (1977); and *People v Hill*, 88 Mich App 50, 65 (1979). The purpose of sequestering a witness is to prevent the witness from "coloring" his or her testimony to conform with the testimony of other witnesses. *People v Stanley*, 71 Mich App 56, 61 (1976). Thus, a trial court presumably has discretion to sequester witnesses from all stages of the proceeding, including jury selection, opening statements, presentation of the case-in-chief, presentation of the defense case, presentation of rebuttal evidence, and closing arguments.

*See Section 6.7(D) for more on the *Jehnsen* case.

The foregoing authority to sequester witnesses or other persons is not unlimited. Under MRE 615, a trial court must not exclude "a person whose presence is shown by a party to be essential to the presentation of the party's cause." This exception ordinarily applies in criminal cases where law enforcement personnel assist the prosecutor with the presentation of evidence, or where victim "support persons" are used. *People v Jehnsen*, 183 Mich App 305, 308 (1990).* See also *Walker v State*, 208 SE2d 350 (Ga App, 1974), which held that, absent a showing of necessity for an orderly presentation of evidence in a homicide trial, it is a denial of a defendant's right to a fair trial to allow the deceased victim's parent to sit at the prosecutor's table. This exception may also apply to expert witnesses who are requested by either party to remain in the courtroom to hear other expert or lay witness testimony.

2. Crime Victims

In Michigan, a crime victim has a constitutional right to attend a criminal trial, juvenile adjudication, and other court proceedings. Const 1963, art 1 § 24 provides in pertinent part:

> "(1) Crime victims, as defined by law,* shall have the following rights, as provided by law:
>
> * * *
>
> "The right to attend trial and all other court proceedings the accused has the right to attend."

*For a definition of "victim" under the three articles of the Crime Victim's Rights Act, see MCL 780.752(1)(j) (felony); MCL 780.781(1)(i) (juvenile); and MCL 780.811(1)(g) (serious misdemeanor).

A crime victim may attend every court proceeding that an accused person has a right to attend. An accused person does not have a right to attend *all* court proceedings: he or she only has a right to attend proceedings involving voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, imposition of sentence, and any other stage of trial where a defendant's "substantial rights" might be adversely affected. *People v Mallory*, 421 Mich 229, 247 (1984). See also *People v Thomas*, 46 Mich App 312, 320 (1973) (the accused is entitled to be present at pretrial evidentiary hearings on admissibility of evidence); and MCL 768.3 (a person accused of a felony must be present during trial, but a person accused of a misdemeanor may request leave of court to appear through an attorney). However, the accused does not have the right to attend motions, conferences, and discussions of law, even during trial, if they do not involve "substantial rights" vital to the defendant's participation in his or her own defense. *Thomas*, *supra* at 319-320.

A victim's constitutional right to attend *trial* is circumscribed by one significant limitation: upon good cause shown, the victim may be sequestered as a witness until he or she *first* testifies. Provisions of the felony and misdemeanor articles of the Crime Victim's Rights Act (CVRA) state:

> "The victim has the right to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness. *If the victim is going to be called as a witness, the court may, for good cause shown, order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies*." MCL 780.761; and MCL 780.821. [Emphasis added.]*

*MCL 780.789 creates a similar right for crime victims to attend an entire contested adjudication, a "traditional" waiver hearing, and a case designation hearing, after the victim first testifies.

If the defense also identifies the victim as a witness for trial, i.e., places the victim's name on the defense witness list, a court may, under the foregoing statutory provisions, and upon good cause shown, only sequester the victim until he or she first testifies, which would presumably have occurred in the prosecution's case-in-chief.

While the Court of Appeals did "not necessarily disagree" that a crime victim has a constitutional right to be present for the trial in its entirety, including proceedings occurring before the victim's testimony, the Court declined to specifically hold as much, where the case could be resolved on other grounds. *People v Meconi*, 277 Mich App 651, ___ (2008). In *Meconi*, *supra* at ___,

the victim inadvertently violated a sequestration order when she remained in the courtroom during opening statements. The trial court declared a mistrial and excluded the victim's testimony from the second trial. *Id*. at ___. The Court of Appeals held that the trial court abused its discretion in precluding the victim from testifying because the victim only heard brief opening statements and not the *testimony* of other witnesses, the violation of the sequestration order was not purposeful, and the case was a scheduled bench trial at which the trial court would be capable of determining the victim's credibility with the knowledge that she heard opening statements. *Meconi*, *supra* at ___.

In his concurring opinion, Judge Sawyer concluded that Const 1963, art 1, § 24(1) grants a crime victim the right to be present at trial to the same extent that a defendant has the right to be present, including the right to be present at portions of the trial that occur before the victim testifies, such as opening statements. *Meconi*, *supra* at ___. Judge Sawyer rejected the conclusion that MCL 780.761 validly grants the trial court authority to sequester the victim, and opined that a crime victim's constitutional right to attend trial cannot be limited by statute. *Meconi*, *supra* at ___.

*For the definition of "victim," see MCL 780.752(1)(j) (felony article); and MCL 780.811(1)(g) (misdemeanor article).

The right to attend trial does not extend to incarcerated crime victims. Under the CVRA's felony and misdemeanor articles, incarcerated individuals cannot exercise the rights and privileges established for crime victims; however, such individuals who otherwise fall under the definition of "victim"* may submit a written statement for the court's consideration at sentencing. See MCL 780.752(4) (felony article); and MCL 780.811(4) (misdemeanor article).

B. Rebuttal Case At Trial

A trial court's authority to sequester a rebuttal witness depends upon whether the witness is also a victim of the crime. The following subsections discuss this authority.

1. Witnesses (Excluding Crime Victims)

*Both MCL 600.1420 and MRE 615 are further discussed in Section 6.5(A).

A trial court may sequester a rebuttal witness *before or after* he or she testifies in rebuttal. Neither MCL 600.1420 nor MRE 615 limit a court's authority in such circumstances.*

2. Crime Victims

Although MCL 600.1420 and MRE 615 provide a court with broad authority to sequester a *witness* before or after he or she testifies in rebuttal, the two CVRA statutes discussed above in Section 6.5(A), MCL 780.761 and MCL 780.821, proscribe a court from sequestering a *victim* after he or she *first* testifies. Promulgated under Const 1963, art 1 § 24, these statutes refer specifically to a "victim" and not the more general term "witness." Under the rules of statutory construction, when two statutes or provisions conflict, and one is specific to the subject matter while the other is generally applicable, the

specific statute or provision prevails. *Gebhardt v O'Rourke*, 444 Mich 535, 542-543 (1994). Based on this rule of statutory construction, and their constitutional basis, an argument could be made that the two CVRA statutes govern the issue of sequestering rebuttal witnesses who are also victims. Under that analysis, if the victim *first* testifies in the case-in-chief (or in the defense case), a trial court cannot sequester the victim either before or after his or her rebuttal testimony. However, if the victim did not testify in the case-in-chief (or in the defense case), the victim may be sequestered before testifying in rebuttal, but not after.

C. Sanctions For Violations of Sequestration Orders

A trial court has discretion in instances of violations of sequestration orders "to exclude or to allow the testimony of the offending witness." *People v Nixten*, 160 Mich App 203, 209-210 (1987).

"[T]he United States Supreme Court has recognized three sanctions that are available to a trial court to remedy a violation of a sequestration order: '(1) holding the offending witness in contempt; (2) permitting cross-examination concerning the violation; and (3) precluding the witness from testifying.'" *People v Meconi*, 277 Mich App 651, ___ (2008), quoting *United States v Hobbs*, 31 F3d 918, 921 (CA 9, 1994), citing *Holder v United States*, 150 US 91, 92 (1893). "[C]ourts have routinely held that exclusion of a witness' testimony is an extreme remedy that should be sparingly used." *Meconi*, *supra* at ___.

Sequestered witnesses who discuss their testimony or the evidence outside the courtroom do not, in the absence of specific notice not to discuss such matters, automatically violate a sequestration order. *People v Stanley*, 71 Mich App 56, 61-62 (1976).

6.6 Separate Waiting Areas for Crime Victims

For a defendant charged with a felony, the Crime Victim's Rights Act, at MCL 780.757, provides:

> "The court shall provide a waiting area for the victim separate from the defendant, defendant's relatives, and defense witnesses if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the court shall provide other safeguards to minimize the victim's contact with defendant, defendant's relatives, and defense witnesses during court proceedings."

MCL 780.817 and MCL 780.787 contain substantially similar provisions for proceedings involving adults charged with "serious misdemeanors" and juveniles.

The Michigan Sexual Assault Systems Response Task Force, in its report *The Response to Sexual Assault: Removing Barriers to Services and Justice* (2001), p 59 § H, recommends that:

> "Courts provide a waiting area [e.g., an unused jury deliberation room, conference room, isolated hallway] for the victim separate from the defendant, the defendant's relatives, and defense witnesses if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the court provides (sic) other safeguards to minimize the victim's contact with the defendant, the defendant's relatives, and defense witnesses during court proceedings (as authorized by MCL 780.757)."

If a separate waiting area is not available or practical, another approach is to stagger the arrival and departure times of the defendant or juvenile and the victim. Yet another approach is to use court or law enforcement personnel to escort the victim from the courthouse to his or her mode of transportation.

6.7 Special Protections For Victims and Witnesses While Testifying

This section explores the special procedures that a court may use to protect victims and witnesses while testifying.

A. Victims and Witnesses (Regardless of Age or Disability)

Under MRE 611(a), a trial court is given broad authority to employ special procedures to protect any victim or witness while testifying. MRE 611(a) provides:

> "(a) *Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) *protect witnesses from harassment or undue embarrassment*." [Emphasis added.]

Unlike the statutes discussed below in Section 6.7(B), MRE 611(a) contains no age or developmental disability restrictions and thus may be applied to all victims and witnesses. Moreover, MRE 611(a) contains no restrictions as to

the specific type of procedures or protections that may be employed to protect victims and witnesses. Some of these procedures may include the protections discussed below in Section 6.7(B), such as allowing the use of dolls or mannequins, providing a support person, rearranging the courtroom, shielding or screening the witness from the defendant, or allowing close-circuit television or videotaped depositions in lieu of live, in-court testimony.

A trial court is also free to use its authority under other rules, including any rules of civil procedure that apply in criminal cases. See MCR 6.001(D); and *People v Grove*, 455 Mich 439, 464-465 (1997). See also *People v Adamski*, 198 Mich App 133, 138 (1993) (trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant).

B. Victims and Witnesses Under 16 or 16 and Older With Developmental Disabilities

The Revised Judicature Act, at MCL 600.2163a, and Juvenile Code, at MCL 712A.17b, authorize the use of the following procedures to protect child and developmentally disabled victim-witnesses while testifying in specified court proceedings:

- Dolls or mannequins.
- Support persons.
- Rearranging the courtroom and shielding/screening witnesses from defendant and other persons.
- Videotaped depositions and closed-circuit television.

These procedures and protections are in addition to other protections and procedures afforded by law or court rule. See MCL 600.2163a(15); and MCL 712A.17b(14). See also *In re Hensley*, *supra* at 333-334 (these statutory provisions supplement rather than limit a trial court's authority to protect specified child and developmentally disabled witnesses).

A court is free to go beyond the statutory procedures enunciated in MCL 600.2163a and MCL 712A.17b and to use its authority under other rules, such as MRE 611.* *In re Hensley*, at 335. See also *People v Adamski*, 198 Mich App 133, 138 (1993) (trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant).

*A court may also choose to employ any rules of civil procedure that generally apply in criminal cases. MCR 6.001(D); and *People v Grove*, 455 Mich 439, 464-465 (1997).

Under MCL 600.2163a(2) and MCL 712A.17b(2)(a), the statutory protections described above only apply to cases involving one of the following offenses:

- Child abuse, MCL 750.136b.
- Sexually abusive commercial activity involving children, MCL 750.145c.
- First-degree criminal sexual conduct, MCL 750.520b.
- Second-degree criminal sexual conduct, MCL 750.520c.
- Third-degree criminal sexual conduct, MCL 750.520d.
- Fourth-degree criminal sexual conduct, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.

In addition to involving one of the foregoing offenses, MCL 600.2163a(1)(b) and MCL 712A.17b(1)(b) require that the witness be either one of the following before the statutory protections described above can be applied:

- Under 16 years of age, or
- 16 years of age or older and have a "developmental disability."

Although MCL 600.2163a(1)(a) and MCL 712A.17b(1)(a) do not define "developmental disability," they reference MCL 330.1100a(20)(a)-(b), which contains a definition of that term. The definition in MCL 330.1100a(20)(a)-(b) draws a distinction based upon a witness's age. For child witnesses up to age five, "developmental disability" means a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in a developmental disability, as defined below, if services are not provided. MCL 330.1100a(20)(b). For witnesses over age five, "developmental disability" is defined under MCL 330.1100a(20)(a)(ii)-(v) as meaning a severe, chronic condition that meets all of the following requirements:

- It is manifested before the individual is 22 years old.
- It is likely to continue indefinitely.
- It results in substantial functional limitations in three or more of the following areas of major life activity:
  - Self-care.
  - Receptive and expressive language.
  - Learning.

- Mobility.
- Self-direction.
- Capacity for independent living.
- Economic self-sufficiency.

♦ It reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

A "developmental disability" includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment. MCL 600.2163a(1)(a).

The Court of Appeals has stated in dicta that disabilities caused by the charged offense do not qualify as disabilities under MCL 600.2163a. *People v Burton*, 219 Mich App 278, 286 (1996).*

*See Section 6.7(F) for further discussion of the *Burton* case.

C. Dolls or Mannequins

A witness covered by MCL 600.2163a or MCL 712A.17b must be permitted to use dolls or mannequins,* including, but not limited to, anatomically-correct dolls or mannequins, to assist in testifying on direct or cross-examination. MCL 600.2163a(3) and MCL 712A.17b(3).

*See also Section 6.9 on victim gesturing and reenactment.

Permitting a witness to use a doll or mannequin while testifying may protect the witness from undue embarrassment and emotional harm, and it may assist the witness in describing or showing what happened. However, the use of such dolls or mannequins may be inappropriate. A witness may, for example, be too young to understand that the doll is not only an object but also a representation of the human body—and of the witness's actual body (or another represented person's). Michigan's *Forensic Interviewing Protocol*, p 22, developed by the Governor's Task Force on Children's Justice and Family Independence Agency, discusses this issue in more detail:

> "One problem with interview aids is that they are models that represent something else. To use an anatomical doll, for example, the child must realize that the doll is not only an object itself but also a representation of the child. Children between the ages of 2 and 4 years may not have the cognitive sophistication to use interview aids representationally. As a result, dolls often do not help young children report more information about events or help them report more accurately." [Citations omitted.]

Accordingly, a trial court should take measures to assure that the witness understands that the doll or mannequin not only represents a human body but also the actual body of the witness or another person. A trial court should make sure that the witness understands that what is demonstrated on the doll or mannequin is actually what happened to the witness or another person.

Another issue of concern is the potential use of dolls or mannequins in a "suggestive" manner during an investigative interview. Such methods may lead to false reporting or testimony. Because child and developmentally disabled witnesses often provide little or no information when responding to interview questions, particularly open-ended questions, some interviewers like to use dolls and mannequins to assist in understanding the alleged sexual abuse. However, the early injection of such dolls and mannequins into the interview process, especially when coupled with leading questions or suggestive actions by the interviewer, may cause the witness to depict on the doll or mannequin what is being suggested or implied—thus leading to a potentially false report. The *Forensic Interviewing Protocol*, *supra* at 22-23, explains this issue:

> "[S]ome preschool children who are not abused will insert fingers into anatomical dolls or show other sexualized behavior, and studies have shown that the presence of dolls combined with specific and leading questions can lead to false reports." [Citations omitted.]

Because of this, the *Forensic Interviewing Protocol* recommends that interviewers who are authorized to use such aids only introduce the aids *after* the witness has made an allegation. For more information on the potential suggestibility of using dolls and mannequins, see Poole & Lamb, *Investigative Interviews of Children: A Guide for Helping Professionals (1998)*.

The use of anatomically correct dolls is within the sound discretion of the trial court. In *People v Garvie*, 148 Mich App 444, 450-451 (1986),* the Court of Appeals held that the trial court did not abuse its discretion in finding no untoward prejudice from the mere appearance of dolls, despite defendant's argument that the "man" doll was "cynical" and possibly "sinister" looking. The Court also held that the trial court did not abuse its discretion in finding that a proper foundation was established to use the dolls, because the seven-year-old victim was timid, and timidity in such a sensitive case is not unnatural.

**People v Garvie* was decided before the effective date of MCL 600.2163a and MCL 712A.17b.

An expert witness may testify about a victim's reaction in using anatomically-correct dolls or mannequins if the testimony relates the victim's use of the doll with the expert's experience with other victims of sexual abuse. **However, an expert witness may not give an opinion as to whether the victim was actually sexually abused.** In *People v Garrison (On Remand)*, 187 Mich App 657, 659 (1991), a case remanded for reconsideration in light of then-recently decided *People v Beckley*, 434 Mich 691 (1990),* the Court of Appeals reversed defendant's CSC-I conviction based on expert testimony that went

**People v Beckley* is discussed in more detail in Section 8.2(A).

beyond describing the victim's use of the dolls to rendering an opinion as to whether sexual abuse had in fact occurred. After being asked about the significance of the victim's actions in placing a male doll's penis against the mouth of a girl doll and moving the male doll up and down, the expert testified that, "It demonstrates what had occurred to her." Then, after being asked about the significance of the victim's reaction to the anatomical dolls, the expert testified: "[B]ased on my experience, [the victim's] reaction to the dolls demonstrated that she had indeed been sexually abused." Based on this testimony, the Court of Appeals reversed defendant's conviction, finding that the testimony "pointedly suggested that the victim had in fact been sexually abused." *Id*. at 659.

In *United States v Short*, 790 F2d 464, 466-467 (CA 6, 1986), the U.S. Court of Appeals for the Sixth Circuit considered the hearsay nature of a social worker's trial testimony describing a three-year-old girl's behavior while using anatomically correct dolls during a pre-trial interview. The social worker described the victim's actions with the dolls as "moving her fingers and hands over the area depicted as the penis" and then moving "the male doll to her mouth and [placing] her mouth over the genital area." *Id*. at 465. The trial court found the girl unavailable as a witness and admitted these statements under FRE 804(b)(5), the "catch-all" hearsay rule. On appeal, defendant argued that the trial court should have excluded this testimony as being overly prejudicial. The Court of Appeals held that the testimony was properly admitted, but that it should not have been admitted under FRE 804(b)(5) because the testimony largely described the victim's *conduct*, which is not hearsay. *Short*, *supra* at 466-467.

In lieu of using dolls or mannequins, investigators and attorneys may also use anatomical drawings. For a set of 32 line drawings consisting of front and back anatomical views of males and females at four stages of development (pre-school, pre-adolescence, adolescence, and adulthood), see Groth, *Anatomical Drawings: For Use in The Investigation and Intervention of Child Sexual Abuse* (Forensic Mental Health Associates, Inc., 1984).

For a copy of three body maps used in Michigan, see Appendix B.

D. Support Person

MCL 600.2163a(4) and MCL 712A.17b(4) provide that a child or developmentally disabled witness called upon to testify must be permitted to have a support person sit with, accompany, or be in close proximity to the witness during testimony. This right applies to any stage of the proceedings.

*Effective May 1, 2003, amendments to the court rules added a subrule requiring notice of intent to use a support person or to request special arrangements restricting the view of the respondent/ defendant in juvenile proceedings. MCR 3.922(E).

A notice of intent* to use a support person must name the support person, identify the support person's relationship to the witness, and provide notice to all parties that the witness may request the support person to sit with the witness when called upon to testify during any stage of the proceeding. The notice must also be filed with the court and served upon all parties to the proceeding. The court shall rule on any motion objecting to the use of a support person before the date on which the witness desires to use the support person.

When permitting the use of a support person, the trial court should be cognizant of the potential for unduly suggestive nonverbal communication between the support person and the witness. In *People v Jehnsen*, 183 Mich App 305, 308-311 (1990), the Court of Appeals upheld the trial court's decision to use the mother of a four-year-old victim as the support person for the victim under MCL 600.2163a(4). During the victim's cross-examination testimony, the victim's mother nodded her head "yes" or "no" in response to various questions asked of the victim. In a post-trial hearing on a motion for new trial, the trial court found that, although the victim's mother engaged "in nonverbal behavior which could have communicated the mother's judgment of the appropriate answers to questions on cross-examination," there was no correlation between the mother's conduct and the victim's answers. *Jehnsen, supra* at 310. The Court of Appeals found no abuse of discretion by the trial court in denying defendant's motion for a new trial or in denying defendant's motion to sequester the victim's mother made at trial. *Id*. at 310. See also *People v Rockey*, 237 Mich App 74, 78 (1999) (the trial court did not err in allowing the seven-year-old sexual assault victim to sit on her father's lap while testifying, where there was no evidence of nonverbal communication between the victim and her father).

> **Note:** Before testimony is taken, a trial judge may want to ask the support person not to react verbally or non-verbally (with gestures or motions) to questions asked of the witness. Additionally, the judge may also want to consider the use of "victim advocates" or "victim-witness assistants" as support persons. If not called as witnesses, these support persons will not normally present conflicts with sequestration orders.

E. Rearranging the Courtroom and Shielding or Screening the Witness from Defendant or Other Persons

For **preliminary examinations** in criminal proceedings, a party may make a motion to rearrange the courtroom to protect a child or developmentally disabled victim-witness. A court must consider on the record all the following factors when considering whether special arrangements are "necessary to protect the welfare of the witness":

> "(a) The age of the witness.
>
> "(b) The nature of the offense or offenses.

> "(c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public." MCL 600.2163a(9)(a)-(c).

If the court determines on the record that it is necessary to protect the welfare of the witness, it must, after granting the motion, order *both* of the following:

> "(a) All persons not necessary to the proceeding shall be excluded during the witness's testimony from the courtroom where the preliminary examination is held. Upon request by any person and the payment of appropriate fees, a transcript of the witness's testimony shall be made available.
>
> "(b) In order to protect the witness from directly viewing the defendant, the courtroom shall be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The defendant's position shall be located so as to allow the defendant to hear and see the witness and be able to communicate with his or her attorney." MCL 600.2163a(10)(a)-(b).

Similarly, in **criminal trials**, a court must consider on the record the same factors listed above when considering whether special arrangements are "necessary to protect the welfare of the witness." However, if the court finds that special arrangements are necessary and grants the motion, it must order *one or more* of the following:

> "(a) All persons not necessary to the proceeding shall be excluded during the witness's testimony from the courtroom where the trial is held. The witness's testimony shall be broadcast by closed circuit television to the public in another location out of sight of the witness.
>
> "(b) In order to protect the witness from directly viewing the defendant, the courtroom shall be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The defendant's position shall be the same for all witnesses and shall be located so as to allow the defendant to hear and see all witnesses and be able to communicate with his or her attorney.
>
> "(c) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties, and shall be located in front of the witness stand." MCL 600.2163a(12)(a)-(c).

In **juvenile delinquency adjudications,** a party may make a motion to rearrange the courtroom to protect a child or developmentally disabled victim-witness. In determining whether it is necessary to rearrange the courtroom to protect the witness, the court shall consider the following:

> "(a) The age of the witness.
>
> "(b) The nature of the offense or offenses." MCL 712A.17b(10)(a)-(b).

If the court determines on the record that it is necessary to protect the welfare of the witness, the court shall order *one or both* of the following:

> "(a) In order to protect the witness from directly viewing the respondent, the courtroom shall be arranged so that the respondent is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The respondent's position shall be located so as to allow the respondent to hear and see all witnesses and be able to communicate with his or her attorney.
>
> "(b) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties, and shall be located in front of the witness stand." MCL 712A.17b(11)(a)-(b).

F. Using Videotaped Depositions or Closed-Circuit Television When Other Protections Are Inadequate

*The provisions discussed in this section apply to all court proceedings in criminal and delinquency cases, not just trials.

In criminal and juvenile delinquency proceedings,* the court may order a videotaped deposition of a child or developmentally disabled victim-witness on motion of a party or in the court's discretion.

MCL 600.2163a(13) and MCL 712A.17b(12) establish the minimum level of psychological or emotional harm that a trial court must find before it orders a videotaped deposition in lieu of live testimony. First, the trial court must find that defendant's presence will cause a level of trauma that renders the witness unable to testify *truthfully and understandably*, not merely that the witness would "stand mute" when questioned. *People v Pesquera,* 244 Mich App 305, 311 (2001). Second, the trial court must find that the witness will be unable to testify even if the procedures established in MCL 600.2163a(3), (4), (10), and (12) and MCL 712A.17b(3), (4), (11) are employed. These procedures include the use of dolls or mannequins, the presence of a support person, the exclusion of all unnecessary persons from the courtroom, the placement of defendant as far from the witness stand as is reasonable, and the mandatory use of a podium. *Pesquera, supra* at 311.

If the court grants the party's motion to use a videotaped deposition, the deposition must comply with the following requirements of MCL 600.2163a(14) and MCL 712A.17b(13):

- The direct and cross-examination of the witness must proceed in the same manner as if the witness testified at trial; and
- The court must order that the witness, during his or her testimony, not be confronted by the respondent or defendant, but the respondent or defendant must be permitted to hear the testimony of the witness and to consult with his or her attorney.

To preserve a defendant's constitutional right under the Sixth Amendment to be present at trial and to confront witnesses face to face, the court must hear evidence and make particularized, case-specific findings that the procedure is necessary to protect the welfare of a child or developmentally disabled witness. *Pesquera*, *supra* at 309-310. In *Maryland v Craig*, 497 US 836, 855-856 (1990), the United States Supreme Court described the necessary findings:

> "The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify'. . . ."* [Citations omitted.]

*See *In re Vanidestine*, 186 Mich App 205, 209-212 (1990) (*Craig* applied to juvenile delinquency case).

In Michigan, in addition to the constitutional right to be present at trial and to confront witnesses, defendants in felony cases also have a *statutory* right to be "personally present" at trial. MCL 768.3 provides in pertinent part:

> "No person indicted for a felony shall be tried unless personally present during the trial . . . ."

In *People v Krueger*, 466 Mich 50 (2002), the Michigan Supreme Court reversed defendant's CSC-I and attempted CSC-II convictions against his five-year-old daughter, concluding that the trial court violated his statutory right to be "personally present" at trial under MCL 768.3. Pursuant to a pretrial prosecution motion under MCL 600.2163a, the trial court removed defendant (and not the complainant) from the courtroom over his objection and made him watch the complainant's testimony via closed-circuit television. Defendant was allowed to take notes while viewing the testimony and to confer with counsel during the one recess that was called. In addition, the trial court explained to the jury that defendant would not be present in the courtroom during the testimony, and that arrangements had been made so that defendant could view the testimony from another room. On appeal, defendant claimed that these procedures violated both his statutory and constitutional rights to be present at trial. The Supreme Court, after applying principles of statutory construction, which included applying the ordinary meaning of the words "personally" and "present," held that "[g]iven these definitions, there can be no doubt that when a defendant is physically removed from the courtroom during trial, he is not personally present as required by MCL 768.3. Under the facts of this case, the statute was violated." *Krueger*, *supra* at 53-54. Importantly, the Supreme Court also stated that the right to be personally present at trial is not absolute:

> "We are not suggesting that a defendant's statutory right to be personally present under MCL 768.3 is absolute. Rather, the facts of this case do not present a situation where the statutory right can be abrogated. We recognize, also, that a defendant's constitutional right to be present at trial is not absolute. . . . For example, a defendant can lose his Confrontation Clause right to be present in the courtroom under the Sixth Amendment where he continues disruptive behavior after being warned to refrain. . . . However, the facts that would lead to a defendant's removal . . . are not applicable here. There is no allegation that defendant's behavior presented an obstacle to the trial judge's ability to conduct the trial. Thus, we do not address whether constitutional exceptions . . . are applicable to the right conferred by MCL 768.3." *Id*. at 54 n 9. [Citations omitted.]

The Supreme Court then analyzed the extent of the statutory error to determine if it constituted reversible error. In doing so, it evaluated the weight and strength of the untainted evidence in the case, which trial courts may find helpful in analyzing whether a defendant's statutory right to be present is violated:

> "The evidence of defendant's guilt presented a close question. There were no third-party eyewitnesses, no medical findings, and no confession. The complainant initially named someone other than defendant as the

> person who had sexually abused her. Under the circumstances, if there were an error closely linked with the complainant's believability, it had a high probability of influencing the verdict. The trial judge instructed the jury that he had decided to remove defendant from the courtroom. While the instruction made clear that defendant's absence was not voluntary, the court did not attempt to explain why the decision had been made or to allay jury speculation about it.
>
> "Not only do these facts suggest that the proofs were not overwhelming in this case, they illustrate that an effective cross-examination of the complainant was vital to the defense. Yet, in violation of his statutory right, defendant was removed from the courtroom. Although he was permitted to view the proceedings through closed-circuit television, he was effectively unable to convey urgent lines of inquiry to his lawyer. Defendant was provided with paper and pencil with which to take notes and had the opportunity to consult with his attorney only during a break in the complainant's testimony. Additionally, he was deprived of the ability to make the subtle statement by his presence and demeanor in court that he was innocent of the charges made by his daughter." *Id*. at 55.

On the basis of these facts, the Supreme Court in *Krueger* found outcome determinative error requiring the reversal of defendant's criminal sexual conduct convictions. Accordingly, it did not review defendant's constitutional claim.

In a case decided before *Krueger* and not under MCL 768.3, the Court of Appeals held that, in extreme cases, allowing a victim-witness to testify outside the courtroom via closed-circuit television may not violate the defendant's rights of confrontation, even when MCL 600.2163a is inapplicable. In *People v Burton*, 219 Mich App 278, 291 (1996), the defendant was convicted of assault with intent to murder, two counts of CSC-I, and breaking and entering a dwelling with intent to commit a felony for sexually assaulting and savagely beating the victim in her home. The victim was a thirty-six-year-old, dyslexic woman with long-standing emotional problems. The beating caused her to suffer a brain injury and head trauma. At trial, she began testifying but then experienced difficulties in testifying. After holding an evidentiary hearing outside the jury's presence, the trial court permitted the victim to finish testifying by closed-circuit television in the judge's chambers. The trial court relied in part on MCL 600.2163a, concluding that the beating caused the victim to suffer from a "developmental disability." The trial court also found that the victim would have been unable to testify in the defendant's presence. However, on appeal, the Court of Appeals found that the trial court misapplied MCL 600.2163a, because the beating, which caused many of the victim's mental problems, did not occur

*The Court of Appeals found that the evidence demonstrated that before the beating, the victim was not disabled. *Burton*, *supra* at 286. The Court stated in dicta that disabilities caused by the charged offense do not qualify as disabilities under MCL 600.2163a(1). *Burton*, *supra* at 286-287.

before her 18th birthday, as required by the statute.* Nevertheless, the Court of Appeals held that the trial court did not err in allowing the victim to testify by way of closed-circuit television, despite the inapplicability of MCL 600.2163a. The Court specifically held that where a victim is "mentally and psychologically challenged and the nature of the assault is extreme," the state's interest in protecting such a victim may be sufficient to limit the defendant's right to confront his accuser face to face. *Id.* at 289. The Court of Appeals also added that the state's interest in the proper administration of justice warranted a limitation of the defendant's rights of confrontation. Without use of closed-circuit television to present the victim's testimony, the victim's preliminary examination testimony would have been read into the record at trial, depriving the defendant of his right to cross-examine the victim. *Id.* The Court of Appeals concluded that the trial court properly found that use of the alternative procedure was necessary to preserve the victim's testimony and protect her from substantial mental and emotional harm. *Id.* at 290-291.

> **Note:** *Krueger* is factually distinguishable from *Burton*. In *Krueger*, the defendant was removed from the courtroom and allowed to take notes while the complainant remained in the courtroom and testified via close-circuit television (additionally, defendant's attorney remained in the courtroom and defendant was only allowed to consult with the attorney during one recess). In *Burton*, the victim was removed from the courtroom and testified via closed-circuit television from the judge's chambers while the defendant presumably remained in the courtroom to consult with his attorney during the victim's entire testimony.

G. G. Taking, Using, and Disclosing Videorecorded Statements

Effective March 31, 2003, 2002 PA 604 amended MCL 600.2163a, and 2002 PA 625 amended MCL 712A.17b, by revising and adding new provisions on the use and disclosure limitations of videorecorded statements of witnesses. The following details the salient revisions and additions.

A "videorecorded statement," which replaces the word "videotaped statement," specifically excludes videorecorded depositions from its definition, as follows:

> "'Videorecorded statement' means a witness's statement taken by a custodian of the videorecorded statement as provided in subsection (5). Videorecorded statement does not include a videorecorded deposition taken as provided in subsections (17) and (18)." MCL 600.2163a(1)(c) and MCL 712A.17b(1)(c).

A "custodian of the videorecorded statement" means any of the following:

- The family independence agency;
- Investigating law enforcement agency;
- Prosecuting attorney;
- Department of attorney general; or
- Another person designated under the county protocols established as required by MCL 722.628. MCL 600.2163a(1)(a) and MCL 712A.17b(1)(a).

A videorecorded statement is subject to a court protective order to protect the witness's privacy if the statement becomes part of the court record. MCL 600.2163a(11) and MCL 712A.17b(10).

Unless otherwise provided in MCL 600.2163a and MCL 712A.17b, a videorecorded statement must not be copied or reproduced in any manner and is exempt from disclosure under Michigan's Freedom of Information Act (FOIA) and under another statute or Michigan court rule governing discovery. However, the production or release of a transcript of the videorecorded statement is not prohibited. MCL 600.2163a(12) and MCL 712A.17b(11). In addition, if authorized by the prosecuting attorney in the county where the videorecorded statement was taken, "a videorecorded statement may be used for purposes of training the custodians of the videorecorded statement in that county on the forensic interview protocol implemented as required by [MCL 722.628]." MCL 600.2163a(9) and MCL 712A.17b(8).

A custodian of the videorecorded statement may release or consent to the release or use of a videorecorded statement or copies of the videorecorded statement to the following entities:

- Law enforcement agency;
- An agency authorized to prosecute the criminal case; and
- An entity that is part of the county protocols established under MCL 722.628. MCL 600.2163a(8) and MCL 712A.17b(7).

In prosecutions of adult offenders, the defense has the right to view and hear a videorecorded statement before the preliminary examination, and, upon request, the prosecutor must also provide the defense with reasonable access to the videorecorded statement at a reasonable time before the defendant's pretrial or trial. MCL 600.2163a(8). Additionally, to prepare for a court proceeding, the court may order that a copy of the videorecorded statement be given to the defense under protective conditions, "including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement." *Id*. In juvenile adjudications, the defense has the right to view and hear a videorecorded statement "at a reasonable time before it is offered into evidence." MCL 712A.17b(7). Additionally, to prepare for a court proceeding, the court may order that a copy of the videorecorded

statement be given to the defense under protective conditions, "including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement." *Id*.

In prosecutions of adult offenders, a videorecorded statement may be used to support "a factual basis for a no contest plea or to supplement a guilty plea," in addition to its other statutorily authorized uses, i.e., pretrial proceedings (except preliminary examinations), impeachment purposes, and sentencing purposes. MCL 600.2163a(6)(d). In juvenile proceedings, a videorecorded statement "shall be admitted at all proceedings except the adjudication stage." MCL 712A.17b(5).

The unauthorized release or consent to release of a videorecorded statement by an individual, including, but not limited to, a custodian of the videorecorded statement, the witness, or the witness's parent, guardian, guardian ad litem, or attorney is a misdemeanor punishable by imprisonment for not more than 93 days or a maximum $500.00 fine, or both. MCL 600.2163a(10), (20) and MCL 712A.17b(9), (19).

Videorecorded statements of minor children are properly admitted under MCL 712A.17b(5) at all proceedings except the adjudicative stage; therefore, video statements of minor children were admissible at an evidentiary hearing held under MCR 3.972(C)(2) because the hearing was held before the beginning of trial. *In re Archer*, 277 Mich App 71, 81 (2007).

6.8 Defendant's Right of Self-Representation and Cross-Examination of Sexual Assault Victims

During the cross-examination of a witness, a self-represented defendant may try to use intimidation or subtle coercion through the line of questioning or the manner in which the questions are asked to cause trauma to the witness or to obstruct testimony. This is especially true with child witnesses. This section explores a defendant's right to self-representation, and includes appropriate alternatives to allowing the self-represented defendant cross-examine victims and witnesses: such as appointing standby counsel and preparing written questions to be read by the court or standby counsel.

The right to self-representation is implicitly guaranteed by the Sixth Amendment. *Faretta v California*, 422 US 806 (1975). The right is specifically guaranteed by the Michigan Constitution and state statute. Const 1963, art 1, § 13; and MCL 763.1. However, the right to self-representation is not absolute. It may be limited or even terminated when, for instance, the defendant engages in "serious and obstructionist misconduct." *Faretta, supra* at 834, n 46.

The determination of when self-representation is appropriate is within the discretion of the trial judge. *People v Anderson*, 398 Mich 361, 366 (1976). In *Anderson*, the Michigan Supreme Court held that trial courts must substantially comply with the following waiver of counsel procedures:*

*Trial courts must also substantially comply with the procedures set forth in MCR 6.005(D) governing the appointment and waiver of counsel.

- The defendant's request must be unequivocal.
- The trial court must determine whether defendant asserted his right knowingly, intelligently, and voluntarily, and that the defendant is aware of the dangers and disadvantages of self-representation.
- The trial court must determine that *defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business*. *Id*. at 367-368. [Emphasis added.]

Additionally, MCR 6.005 requires the trial court to offer the assistance of an attorney and to advise the defendant about the possible punishment for the charged offense. *People v Ahumada*, 222 Mich App 612, 615 (1997). In *Ahumada*, the Court of Appeals made these comments regarding a defendant's request for self-representation:

> "Proper compliance with the waiver of counsel procedures requires that the court engage, on the record, in a methodical assessment of the widom of self-representation by the defendant. . . . The defendant must exhibit an intentional relinquishment or abandonment of the right to counsel, and the court should indulge every assumption against waiver. . . . The presumption against waiver is in large part attributable to society's belief that defendants with legal representation stand a better chance of having a fair trial than people without lawyers. . . . If a court does not believe the record evidences a proper waiver, the court should note the reasons for its belief and require counsel to continue to represent the defendant. . . ." *Id*. at 616-617. [Citations omitted.]

A trial judge has discretion to appoint, either sua sponte or by request, standby counsel to assist the self-represented defendant. *People v Adkins (After Remand)*, 452 Mich 702, 720 n 15 (1996). Appointment of standby counsel may even be made over defendant's objection, as long as defendant still maintains actual control over the case presented to the jury, and if standby counsel's participation is not allowed to destroy the jury's perception that the defendant is representing himself. *McKaskle v Wiggins*, 465 US 168, 178 (1984).

In *People v Russell*, 254 Mich App 11 (2002), the Court of Appeals found that a defendant may implicitly make a choice of self-representation by repeatedly rejecting representation of court-appointed counsel in the face of numerous warnings and advice to the contrary. In Russell, the trial court permitted

defendant's first appointed counsel to withdraw after defendant complained of his representation. Afterward, the trial court appointed another attorney. On the first day of trial, the defendant, because of an expressed dissatisfaction with appointed counsel, and also because of an alleged "personality conflict," requested appointment of substitute counsel, which was denied by the trial court. Defendant thereafter repeatedly rejected representation by his court-appointed counsel but said he wanted to be represented by counsel. After being thoroughly advised of the risks of self-representation, the trial court concluded that defendant had knowingly, intelligently, and voluntarily waived his right to representation.

The Court of Appeals found that the trial court did not abuse its discretion in denying defendant's request for substitute counsel, or in permitting defendant to proceed in propria persona. To support its decision on permitting defendant's self-representation, the Court of Appeals stated:

> "The record here demonstrates that defendant was thoroughly advised of the risks of self-representation and was repeatedly advised that if he chose to reject court-appointed counsel, his options were self-representation or to retain counsel. Defendant made his unequivocal choice, not by explicitly demanding to represent himself, but implicitly by repeatedly rejecting representation by court-appointed counsel in the face of numerous warnings and advice to the contrary. Thus, by his own conduct defendant demonstrated his unequivocal choice to proceed in propria persona. Defendant confirmed this choice again after jury selection when he again asserted he did not want [his second court-appointed counsel] to participate in the trial."

Relying on *Anderson, supra* at 370, the Court held that under the totality of the circumstances, the defendant "knowingly, intelligently and voluntarily waived his right to counsel [and was] aware of the dangers of self-representation." *Russell, supra* at 17–18.

Although no Michigan appellate court has decided the boundaries of a self-represented defendant's right to *personally* cross-examine a victim or witness, courts in other jurisdictions have decided that a criminal defendant may be denied the opportunity to personally cross-examine a victim or witness.

♦ *Fields v Murray*, 49 F3d 1024 (CA 4, 1995):

*The *Craig* case is discussed in Section 6.7(F).

The defendant was charged with sexually assaulting several girls, aged 11 through 13, one of whom was his daughter. Before trial, he wrote a letter to the trial judge, expressing his wish to act as co-counsel so he could cross-examine the victim-witnesses. The trial court denied defendant's request but alternatively allowed him to submit questions to his attorney to be read to the victim-witnesses during cross-examination. On appeal, defendant argued that the trial court's ruling denied him his right of self-representation. *Id.* at 1026-1028. The Court of Appeals assumed that the defendant properly invoked his

right of self-representation but held that the trial court's refusal to allow him to personally cross-examine the victim-witnesses did not deprive him of his right of self-representation. *Id.* at 1034. The Court of Appeals applied the test used in *Maryland v Craig*, 497 US 836 (1990),* to determine whether allowing child victims of sexual abuse to testify out of the defendant's presence denied the defendant the federal constitutional right of confrontation. To determine whether a trial court is required to allow the defendant to cross-examine the victim-witnesses, it must find:

> (1) That the elements of the right of self-representation, other than the right to question witnesses, will be "otherwise assured" by the alternative procedure to be used, and
>
> (2) That the denial of personal cross-examination of the witness is necessary to further an important public policy. *Fields*, *supra* at 1035.

As to the first prong, the *Fields* Court concluded that defendant's ability to present his chosen defense and the jury's perception that defendant was representing himself, two key elements of the right of self-representation, were "otherwise assured" by allowing him to submit written questions to be read to the victim-witnesses and to personally conduct all other parts of the case. *Id.* As to the second prong, the Court concluded that the state's interest in protecting child victims of sexual abuse from the trauma of cross-examination by their alleged abuser is "at least as great as, and likely greater than, the State's interest in *Craig* of protecting children from the emotional harm of merely having to testify in their alleged abuser's presence." *Fields*, *supra* at 1036. Moreover, because the likelihood of emotional trauma from being cross-examined by the alleged abuser is greater than that from being required to testify in the alleged abuser's presence, the trial court need not receive psychological evidence before denying the defendant the opportunity to personally cross-examine the witness. *Id.* at 1036-1037.

♦ *State v Estabrook*, 842 P2d 1001 (Wash App, 1993):

The defendant was convicted of sexually assaulting a developmentally disabled victim whose chronological age at the time of trial was 15 but whose "mental age" was 11. Defendant waived his right to counsel and represented himself at trial. Instead of allowing the defendant to personally cross-examine the victim, the trial court directed the defendant to submit written questions, which the court then used to cross-examine the victim. The trial court advised the jury of the procedure to be used, allowed the defendant additional time to prepare the questions after direct examination of the victim, and refused to sustain any objections to the scope of the defendant's questions. *Id.* at 1004. On appeal, the Washington Court of Appeals concluded that the procedure used did not violate the defendant's right of self-representation. *Id.* at 1006. The Court of Appeals applied the test used in *McKaskle v Wiggins*, 465 US 168, 176-178 (1984), a case considering whether unsolicited participation by

standby counsel denies the pro-se defendant his or her right of self-representation. That test is as follows:

> (1) The defendant must retain actual control over the case he or she chooses to present to the jury, and
>
> (2) Standby counsel's unsolicited participation must not destroy the jury's perception that the defendant is representing himself or herself. *Estabrook*, *supra* at 1006.

In *Estabrook*, the Court concluded that the defendant maintained control over his defense through submission of the written questions to the judge. In addition, the judge's instructions to the jury emphasized that the defendant was representing himself despite the judge's asking questions of the victim-witness. *Id.*

♦ *Commonwealth v Conefrey*, 570 NE2d 1384 (Mass, 1991):

A defendant charged with the sexual assault of his daughter represented himself at trial but was denied the opportunity to personally cross-examine the victim. Instead, he directed questioning of the victim through his standby counsel. *Id.* at 1388-1389. The Supreme Judicial Court of Massachusetts held that defendant's right of self-representation was violated by this procedure. *Id.* at 1389. The Court concluded that there was no record evidence that "the defendant intended to exploit or manipulate the right of self-representation for ulterior purposes," and the judge's mere belief that the victim-witness would be intimidated or harmed by the cross-examination was found insufficient to deny the defendant the opportunity to personally question the victim-witness. The Court stated, however, that if it were established during a separate hearing or during the cross-examination itself that the defendant would manipulate the questioning or that the victim would be harmed, then preventing the defendant's questioning of the victim would not violate his right of self-representation. *Id.* at 1390-1391. The Court remanded for a new trial.

6.9 Victim Gesturing and Reenactment

*See Section 6.7(C) for discussion on the use of dolls and mannequins.

A victim of a sexual assault crime experiences a multitude of emotions, including, to name a few, extreme fear, embarrassment, and humiliation. Because of the potential of making victims recreate these emotions through gesturing and reenactment* on the witness stand, the Michigan Sexual Assault Systems Response Task Force, in its report *The Response to Sexual Assault: Removing Barriers to Services and Justice* (2001), p 59 § L, recommends that trial courts adopt the following as a best practice:

> "On the witness stand, victims are not required to show on their own bodies how they were touched or to demonstrate the position in which they were assaulted. This does not imply that a victim may not indicate by gesturing to clarify

> where contact was made. However, this should be used sparingly and only as necessary to clarify the record."

If a witness is allowed to gesture or reenact while testifying, it is important for the court or counsel to accurately describe on the record the physical actions of the witness. Although sometimes difficult and tedious, a detailed description of the gesturing and reenactment, if done well, will help the attorneys and judges on appellate review or in subsequent civil cases.

6.10 Prohibited Disclosure of Visual Representation of Victim

In Michigan, crime victims have a constitutional right to be treated with respect for their dignity and privacy. Const 1963, art 1, § 24. To protect this right, the Crime Victim's Rights Act exempts from disclosure under Michigan's FOIA the following information and visual representations of a crime victim:

> "(a) The home address, home telephone number, work address, and work telephone number of the victim unless the address is used to identify the place of the crime.
>
> "(b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim." See MCL 780.758(3)(a)-(b) (felonies); MCL 780.818(2)(a)-(b) (serious misdemeanors); and MCL 780.788(2)(a)-(b) (juveniles).

These provisions "shall not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services." See MCL 780.758(4) (felonies); MCL 780.818(3) (serious misdemeanors); and MCL 780.788(3) (juveniles).

6.11 Limitations on Testimony Identifying a Victim's Address, Place of Employment, or Other Information

In Michigan, crime victims have a constitutional right to be treated with respect for their dignity and privacy. Const 1963, art 1, § 24. To protect this right, the Crime Victim's Rights Act allows a prosecutor to request that a victim's identifying information be protected from disclosure at trial. MCL 780.758(1) states:

> "Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at defendant's direction against the victim or the victim's immediate family, the prosecuting attorney

> may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion shall be in camera."

These protections also apply to serious misdemeanor* cases, MCL 780.818, and to juvenile delinquency proceedings, MCL 780.788. Moreover, in juvenile delinquency proceedings, there is an additional provision that allows the victim to move to limit testimony if the prosecutor is absent. MCL 780.788(1).

*"Serious misdemeanors" are described in MCL 780.811(1)(a).

> **Note:** In criminal sexual conduct prosecutions, if the victim, defendant, or counsel requests it, the magistrate must order that the names of the victim and defendant and the details of the alleged offense be suppressed until the defendant is arraigned on the information, the charge dismissed, or the case otherwise concluded, whichever occurs first. See MCL 750.520k and Section 2.1.

The Michigan Sexual Assault Systems Response Task Force, in its report *The Response to Sexual Assault: Removing Barriers to Services and Justice (2001)*, p 59 § J, recommends the following best practice suggestion:

> "Courts should omit the use of the victim's name in written opinions or in public comments, for example (sic) at sentencing."

The United States Supreme Court has held that it is error (and potentially a violation of the Confrontation Clause) for a trial court to prohibit questioning concerning a witness's real name, place of employment, and place of residence (including the address), unless the questioning is intended to harass, annoy, or humiliate the witness, or if the questioning would endanger the witness's personal safety. In *Alford v United States,* 282 US 687, 692-694 (1931), the United States Supreme Court held that it was error for the trial court to prohibit cross-examination of a prosecution witness regarding the witness' place of residence. In *Smith v Illinois* 390 US 129, 132-133 (1968), the Supreme Court held that the trial court's refusal to allow the defendant to cross-examine a witness concerning his real name and address denied defendant his federal constitutional right to confront the witnesses against him. See also *People v Paduchoski*, 50 Mich App 434, 438 (1973) (the trial court denied defendant his federal constitutional right of confrontation by refusing to allow cross-examination regarding a witness' place of employment). However, the United States Supreme Court in *Alford* and *Smith* also held that the trial court may limit cross-examination regarding a witness' address if the questions tend merely to harass, annoy, or humiliate the witness, or if the questions would tend to endanger the personal safety of the witness. See *Alford*, *supra* at 694; and *Smith*, *supra*, at 134-135 (White, J., concurring).

In *People v McIntosh*, 400 Mich 1, 8 (1977), the Michigan Supreme Court held that the trial court did not err in refusing to allow defense counsel to ask a key prosecution witness where she lived. The witness's address was available in police reports and the prosecutor's case file, and the witness had been threatened by several spectators in the courtroom.

6.12 Victim Confidentiality Concerns and Court Records

Court records and confidential files are not subject to requests under Michigan's Freedom of Information Act (FOIA), as the judicial branch of government is specifically exempted from that act. MCL 15.232(d)(v). However, court records are public unless specifically restricted by law or court order. MCR 8.119(E)(1). This section examines specific restrictions on accessing criminal court records that help to preserve the confidentiality of crime victims' identities.*

*On the safety and privacy of crime victims generally, see Miller, *Crime Victim Rights Manual*, chapters 4-5 (MJI, 2001).

A. Felony Cases

The Crime Victim's Rights Act, at MCL 780.758(2), limits access to a victim's address and phone number in felony cases:

> "The work address and address of the victim shall not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The work telephone number and telephone number of the victim shall not be in the court file or ordinary court documents except as contained in a transcript of the trial."

B. "Serious Misdemeanor" Cases

In "serious misdemeanor"* cases, the Crime Victim's Rights Act, at MCL 780.816(1), provides that a court's post-arraignment notice to the prosecutor, which must include the victim's name, address, and telephone number, must "not be a matter of public record." Additionally, MCL 780.830 provides that a victim's address and telephone number maintained by a court or sheriff are exempt from disclosure under Michigan's FOIA.

*"Serious misdemeanors" are described in MCL 780.811(1)(a).

C. Juvenile Delinquency Cases

MCR 3.903(A)(3)(b) characterizes the contents of a juvenile's social file, including victim statements, as confidential. MCR 3.903(A)(3)(b)(vi).

Under MCL 712A.28(2) and MCR 3.925(D)(1), the general rule is that all *records* in juvenile cases are open to the general public, while *confidential files* are not open to the public. MCR 3.903(24) defines "records" as the pleadings, motions, authorized petitions, notices, memorandums, briefs,

exhibits, available transcripts, findings of the court, register of actions, and court orders. MCR 3.903(A)(3)(a) defines "confidential files" as all materials made confidential by statute or court rule, including:

- the separate statement about known victims of juvenile offenses as required by MCL 780.784, and
- the testimony taken during a closed proceeding pursuant to MCR 3.925(A) and MCL 712A.17(7).

"Confidential files" may only be accessed by an individual the court determines has a legitimate interest in the files. MCR 3.925(D)(2). In determining whether a person has a legitimate interest, the court must consider:

- the nature of the proceedings;
- the public's welfare and safety;
- the interest of the minor; and
- any restriction imposed by state or federal law.

6.13 Testing and Counseling for Venereal Disease, Hepatitis, and HIV

This section discusses a court's authority to order testing and counseling for venereal disease, hepatitis, and HIV in two circumstances: (1) after a defendant has been *arrested and charged* for a specified sex offense; and (2) after a defendant has been *bound over* to circuit court on a specified sex offense. For discussion of this authority as it pertains to a defendant *convicted* of, or a juvenile *found responsible* for, a specified sex offense, see Section 9.3.

A. Defendants Arrested and Charged

1. Discretionary Examination and Testing

*SCAO Form MC 234.

Under MCL 333.5129(1), a defendant who is arrested and charged with a violation of any of the following prostitution offenses may, upon order of the court, be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS:*

- Soliciting prostitution, MCL 750.448.
- Receiving a person into a place of prostitution, MCL 750.449.
- Engaging services for purpose of prostitution, MCL 750.449a.

- Aiding and abetting an act prohibited by MCL 750.448 (soliciting prostitution) or aiding and abetting an act prohibited by MCL 750.449 (receiving a person into a place of prostitution), MCL 750.450.
- Keeping, maintaining, operating house of ill-fame, MCL 750.452.
- Pandering, MCL 750.455.
- A local ordinance prohibiting prostitution or engaging or offering to engage the services of a prostitute.

If the examination or test results indicate the presence of venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS, the examination or test results must be reported to the defendant, the department of community health, and the appropriate local health department for partner notification, as required under MCL 333.5114 and MCL 333.5114a. MCL 333.5129(1).

"Venereal disease" means "syphilis, gonorrhea, chancroid, lymphogranuloma venereum, granuloma inguinale, and other sexually transmitted diseases which the department [the department of community health] by rule may designate and require to be reported." MCL 333.5101(1)(h).

2. Mandatory Distribution of Venereal Disease and HIV Information and Recommendation of Counseling

Under MCL 333.5129(2), if a defendant is arrested and charged with a violation of any of the following sex offenses, the judge or magistrate responsible for setting the defendant's condition of release pending trial must distribute to the defendant* the same information on venereal disease and HIV transmission required to be distributed by county clerks to marriage license applicants under MCL 333.5119(1):

*No statutory provision requires distribution of such information to a victim of the following offenses.

- Accosting, enticing, or soliciting a child, MCL 750.145a.
- Gross indecency between males, MCL 750.338.
- Gross indecency between females, MCL 750.338a.
- Gross indecency between males and females, MCL 750.338b.
- Soliciting prostitution, MCL 750.448.
- Receiving a person into a place of prostitution, MCL 750.449.
- Engaging services for purpose of prostitution, MCL 750.449a.
- Aiding and abetting an act prohibited by MCL 750.448 (soliciting prostitution) or aiding and abetting an act prohibited by MCL 750.449 (receiving a person into a place of prostitution), MCL 750.450.
- Keeping, maintaining, operating house of ill-fame, MCL 750.452.

- Pandering, MCL 750.455.
- First-degree criminal sexual conduct, MCL 750.520b.
- Second-degree criminal sexual conduct, MCL 750.520c.
- Third-degree criminal sexual conduct, MCL 750.520d.
- Fourth-degree criminal sexual conduct, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- Intravenously using a controlled substance, MCL 333.7404.*
- A local ordinance prohibiting prostitution, solicitation, gross indecency, or the intravenous use of a controlled substance.

*A person charged or convicted of this crime, or a corresponding local ordinance, is subject to the testing, counseling, and information distribution requirements regarding hepatitis B, hepatitis C, HIV, and AIDS, but not venereal disease. MCL 333.5129(9).

The information required to be distributed by county clerks under MCL 333.5119(1), and thus by a judge or magistrate under MCL 333.5129(2), is educational materials prepared by the department of community health on topics related to venereal disease, HIV transmission, and prenatal care. MCL 333.5119(1). This information must include a list of locations where HIV counseling and testing services financed by the department of community health are available. *Id*.

Additionally, the judge or magistrate must *recommend* that the defendant obtain additional information and counseling at a local health department testing and counseling center regarding venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, and AIDS. MCL 333.5129(2). A defendant's participation in counseling under MCL 333.5129(2) must be voluntary. *Id*.

B. Defendants Bound Over to Circuit Court

1. Mandatory Examination and Testing

*SCAO Form MC 234.

Under MCL 333.5129(3), a defendant who is bound over to circuit court for a violation of any of the following offenses must be ordered by the district court to be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, HIV, and HIV antibodies, provided there is reason to believe the alleged violation involved sexual penetration or exposure to a body fluid of the defendant:*

- Accosting, enticing, or soliciting a child, MCL 750.145a.
- Gross indecency between males, MCL 750.338.
- Gross indecency between females, MCL 750.338a.
- Gross indecency between males and females, MCL 750.338b.

- Aiding and abetting an act prohibited by MCL 750.448 (soliciting prostitution) or aiding and abetting an act prohibited by MCL 750.449 (receiving a person into a place of prostitution), MCL 750.450.
- Keeping, maintaining, operating house of ill-fame, MCL 750.452.
- Pandering, MCL 750.455.
- First-degree criminal sexual conduct, MCL 750.520b.
- Second-degree criminal sexual conduct, MCL 750.520c.
- Third-degree criminal sexual conduct, MCL 750.520d.
- Fourth-degree criminal sexual conduct, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.

> **Note:** The foregoing testing and examination provisions do not apply to "traditional" waiver cases because waived juveniles proceed directly to the criminal division of circuit court for arraignment on the information, not to district court. MCL 712A.4(10). Nor do the foregoing provisions apply to "designated" cases because proceedings which have been "designated" under MCL 712A.2d remain in the family division of circuit court, not the criminal division.

The foregoing examinations or tests must be administered by a licensed physician, the department of community health, or a local health department. MCL 333.5129(3).

"Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."* MCL 333.5129(10)(b).

*This definition is identical to the CSC Act's definition of "sexual penetration" under MCL 750.520a(m). See Section 2.5(W).

"Venereal disease" means "syphilis, gonorrhea, chancroid, lymphogranuloma venereum, granuloma inguinale, and other sexually transmitted diseases which the department by rule may designate and require to be reported." MCL 333.5101(1)(h).

2. Mandatory Counseling

In addition to ordering testing and examination under MCL 333.5129(3), the district court must order a defendant who has been bound over for an offense listed above in Section 6.13(B)(1) to undergo counseling. MCL 333.5129(3).* At a minimum, this counseling must include information regarding the treatment, transmission, and protective measures of venereal disease, hepatitis B infection, HIV infection, and AIDS. *Id.*

*SCAO Form MC 234.

C. Confidentiality of Test Results

A defendant's examination and test results conducted pursuant to MCL 333.5129(3) are confidential, except as provided in MCL 333.5129(1) (disclosure by testing agency to defendant and health departments for partner notification), MCL 333.5129(5) (victim notification by testing agency), or in MCL 333.5129(6)-(7) (disclosure made part of court record but held confidential). MCL 333.5129(3). In addition, all records, reports, and data pertaining to testing, care, treatment, reporting, research, and information pertaining to partner notification under MCL 333.5114a are confidential. MCL 333.5131(1). Finally, the test results or the fact that testing was ordered to determine the presence of HIV infection or AIDS are subject to the physician-patient privilege, MCL 600.2157. MCL 333.5131(2).

D. Disclosure of Test Results

MCL 333.5129(5)-(7) provide three limited exceptions to the foregoing confidentiality requirements. Under these exceptions, the person or agency conducting the examination must disclose the defendant's examination or test results (and other medical information, when specified) to the following persons or entities:

- The victim or person with whom defendant allegedly engaged in sexual intercourse or sexual contact or who was exposed to a body fluid during the course of the crime, if the victim or person consents. MCL 333.5129(5). The court or probate court is responsible for providing the person or agency conducting the examination with the name, address, and telephone number of the victim or other person, if consent is provided. *Id*.

- The court or probate court. MCL 333.5129(6). The examination or test results, including any other medical information, must be made part of the court or probate court record only *after* the defendant is sentenced or an order of disposition is entered for the child. *Id*. This court record is confidential and may only be disclosed to one or more of the following:

  - The defendant or child [juvenile respondent]. MCL 333.5129(6)(a).

  - The local health department. MCL 333.5129(6)(b).

  - The department of public health. MCL 333.5129(6)(c).

  - The victim or other person required to be informed of the results; or, if the victim or other person is a minor or otherwise incapacitated, to the victim's or other person's parent, guardian, or person in loco parentis. MCL 333.5129(6)(d).

  - The defendant or juvenile, upon written authorization, or to the juvenile's parent, guardian, or person in loco parentis. MCL 333.5129(6)(e).

  - As otherwise provided by law. MCL 333.5129(6)(f).

- The department of corrections (for defendants), and the person related to the juvenile or the director of the public or private agency, institution, or facility (for juveniles), if the defendant or juvenile is placed under the custody of any of these entities. MCL 333.5129(7). The court or probate court is responsible for transmitting a copy of the examination and test results, including any other medical information, to these departments, agencies, and facilities. *Id*.

Under MCL 333.5129(7), a person or agency receiving test results or other medical information obtained pursuant to MCL 333.5129(6) or MCL 333.5129(7) from an individual found to be infected with HIV or AIDS is prohibited from disclosing the test results or other medical information, except as specifically permitted under MCL 333.5131 [if made pursuant to a subpoena, court order, or consent, or if made to protect the health of the individual, to prevent further transmission of HIV, or to diagnose and care for a patient]. A person who violates MCL 333.5131 is guilty of a misdemeanor punishable by imprisonment for not more than one year or a maximum $5,000.00, or both. MCL 333.5131(8).

E. Positive Test Results Require Referral for Appropriate Medical Care

A person counseled, examined, or tested under MCL 333.5129 and found to be infected with a venereal disease, hepatitis B, hepatitis C, or HIV, must be referred by the agency providing the counseling or testing for appropriate medical care. MCL 333.5129(8). The agency is not financially responsible for the person's medical care received as a result of the referral. *Id*.

F. Ordering Payment of the Costs of Examination and Testing

Upon conviction or juvenile adjudication the court may order an individual who is examined or tested under MCL 333.5129 to "pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10). MCL 333.5129(11) states:

> "An individual who is ordered to pay the costs of an examination or test under [MCL 333.5129(10)] shall pay those costs within 30 days after the order is issued or as otherwise provided by the court. The amount ordered to be paid under [MCL 333.5129(10)] shall be paid to the clerk of the court, who shall transmit the appropriate amount to

> the physician or local health department named in the order. If an individual is ordered to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction in addition to the costs ordered under [MCL 333.5129(10)], the payments shall be allocated as provided under the probate code of 1939, 1939 PA 288, MCL 710.21 to 712A.32, the code of criminal procedure, 1927 PA 175, MCL 760.1 to 777.69, and the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834. An individual who fails to pay the costs within the 30-day period or as otherwise ordered by the court is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both."

6.14 Voir Dire Concerns in Criminal Sexual Assault Cases

Jury selection in criminal cases involving allegations of sexual assault is important, if not critical, because jurors may make decisions based on misconceptions and erroneous stereotypes about not only the sexual assault, but also the alleged offenders and victims. One sexual assault expert, Paul DerOhannesian II, in his book *Sexual Assault Trials* (Charlottesville, VA: Lexis, 2d ed, Vol 1, 1998), p 147, explained as follows:

> "Most jurors [in sexual assault cases] will make decisions based upon feelings, emotions, and previously held beliefs, and not just upon the facts through a rational process. Beliefs and attitudes can change and have changed about sexual assault, which are reflected in significant changes in the laws that apply to sexual assault. These beliefs and attitudes must be assessed."

Although it did not specifically address the jury selection and the voir dire process, Michigan's Sexual Assault Systems Response Task Force, in its report, *The Response to Sexual Assault: Removing Barriers to Services and Justice*, p 58 § A, made the following recommendations as to best practices:

> "Pretrial and trial processes are conducted so that both the victim and the defendant receive a fair and impartial hearing that conforms to constitutional due process standards *and is as free as possible from taint by myths and stereotypes about sexual assault*." [Emphasis added.]

And on p 58 § E:

> "No judge or court employee makes comments that trivialize sexual assault cases. Such comments include

> remarks about a victim's mode of dress, prior acquaintance with the defendant, personal habits, etc."

The following subsections discuss some ideas and issues regarding sexual assault that a court (and the parties) may want to explore and examine during voir dire.* These subsections are intended only to identify and briefly explain an idea or issue; they are not intended to provide specific questions to ask jurors during voir dire. It is hoped that specific voir dire questions can be developed after reading each subsection. Also, these ideas and issues should not be perceived as precluding discussion of other ideas and issues that pertain to criminal cases generally, such as discussion of the burden and standard of proof, credibility of witnesses, physical and scientific evidence, etc. Because of this, a court may need to set aside more time in sexual assault cases to conduct voir dire.

*For more information on the nature and dynamics of sex offenders and victims, see Chapter 1.

> **Note:** Many of the following voir dire ideas, issues, and concerns were taken from the National Judicial Education Program's *Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault* (SJI, 1994), Unit IV, which also cites Kalven & Zeisel, *The American Jury* (1966) and LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* (1989).

♦ "Rape" and the Criminal Sexual Conduct Act

Michigan repealed its rape statute (MCL 750.520) on April 1, 1975 and replaced it with the Criminal Sexual Conduct Act (the "CSC Act"), MCL 750.520a et seq. The CSC Act prohibits rape, as it was previously defined, as well as other sexual misconduct. See Chapter 2 for further information on the CSC Act. The rape statute was repealed and replaced by the CSC Act for many reasons. One reason was the perceived ambiguities with the former rape statute's terms.* The former rape statute contained imprecise terms like "ravish and carnally know." By contrast, the CSC Act uses more precise and clearly defined terms, such as "sexual penetration" and "sexual contact." See MCL 750.520a(m) and MCL 750.520a(*l*), respectively.

*See Section 2.1 for other reasons why the CSC Act was enacted.

♦ Assumption of Risk

Some jurors may view the alleged sexual assault in terms of the complainant's "assumption of risk," i.e., that because the complainant did certain things—walked alone at night, went to defendant's house or apartment, drank alcohol, used controlled substances, dressed provocatively—he or she "assumed the risk" of the sexual assault and therefore the defendant should be acquitted.

♦ Victim Resistance

A juror may be preoccupied with the issue of whether the complainant resisted the actions of the perpetrator. This preoccupation might be a holdover from repealed rape statutes which required a complainant to resist the actions of the perpetrator "to the utmost." This was a previous requirement under

Michigan's rape statute. *People v Geddes*, 301 Mich 258, 261 (1942). To prove criminal sexual conduct, however, the prosecutor is not required to prove that the complainant resisted the actions of the perpetrator. See Section 7.10; and CJI2d 20.26. The court (or the parties) may want to question jurors about whether they are going to require that the prosecutor prove that the complainant resisted the actions of the defendant.

♦ Victim Corroboration

A juror may be preoccupied with the issue of whether the complainant's testimony is going to be corroborated by other witness testimony or physical evidence. Specifically, a juror may want to see and hear the witness who first reported the sexual assault to authorities, if the complainant was not the first person to report the alleged sexual assault to authorities. However, to prove criminal sexual conduct, a prosecutor does not have to corroborate the testimony of the complainant. See Section 7.9; and CJI2d 20.25. The court (or the parties) may want to question jurors about whether they are going to require that the prosecutor corroborate the complainant's testimony with other evidence, testimonial or physical.

♦ Physical (or Personal) Injury

To believe that a sexual assault occurred, a juror may require evidence that the sexual assault caused a personal injury to the complainant. However, under the CSC Act, unless it is an element of the offense, the prosecutor does not have to show that the complainant sustained a physical injury as a result of the sexual assault. See Section 2.5(R) for CSC crimes requiring proof of personal injury; and CJI2d 20.24, Sufficiency of Force.

♦ Consent

*See Section 4.7 for the applicability of the consent defense to specific criminal sexual conduct offenses.

Consent is an affirmative defense to many offenses under the CSC Act.* Although nonconsent is not an element in any criminal sexual conduct crime, the prosecutor has the burden of disproving consent, if asserted by defendant, beyond a reasonable doubt. See CJI2d 20.27.

Consent is determined from the complainant's subjective state of mind, not the defendant's reasonable belief that the victim consented. Consent does not have to be stated. It can also be given nonverbally by the complainant's actions. See CJI2d 20.27(3) (a factfinder "should consider all of the evidence"). Furthermore, a complainant may initially consent to sexual activity but later change his or her mind. The complainant may also consent to some types of sexual activity but not to others. A court (or the parties) may want to ask a juror whether he or she will consider all the circumstances surrounding the event when determining whether consent was freely and willingly given and not forced or coerced.

♦ Acquaintance Sexual Assault (Acquaintances, Intimate Partners, Spouses)

Like some jurors in domestic violence cases, a juror in a sexual assault case may think that an alleged sexual assault between acquaintances, intimate partners, and spouses is a "personal matter" and should not have been prosecuted. For purposes of charging a criminal sexual conduct crime, the relationship between the defendant and complainant is relevant only when it is a specific element of the offense, e.g., "by blood or affinity," "member of the same household," or "position of authority."* Finally, although the CSC Act contains no spousal exception, see MCL 750.520*l*, a person may not be charged or convicted under the CSC Act solely because his or her legal spouse is under age 16, mentally incapable, or mentally incapacitated. See MCL 750.520*l* and Section 2.1.

*See Sections 2.5(E), 2.5(K), and 2.5(T), respectively, for more information on these elements.

♦ Delay In Reporting Crime

A juror may view a delay in reporting an alleged sexual assault as bearing on the question of whether it occurred or did not occur. A court (or the parties) may want to question jurors on any reporting delays involved in the case, and to ask them whether they believe that there could be legitimate reasons to delay reporting a sexual assault, e.g., fear of embarrassment, humiliation, and retaliation, or because the complainant was unconscious or under the influence of alcohol or controlled substances. A juror could be asked whether they understand that a delay in reporting an alleged sexual assault crime may depend on the circumstances of the crime and/or the personal nature of the complainant.

♦ Physical Appearance

A juror may have a preconceived notion of what a sex offender or a sexual assault victim should look like. As a result, a juror may base his or her decision in the case, in whole or in part, on this preconception. A court (or the parties) may want to question jurors on this issue, and to ask them whether they are going to, in whole or in part, decide the case based their personal preconceptions of what a sex offender or sexual assault victim should look like, including the style and type of clothing.

♦ Juror History of Sexual Assault

A juror may have been a victim of a sexual assault, reported a sexual assault, or testified in a sexual assault case—or all of the above. A court (or the parties) may want to question jurors on this issue, and, if a juror answers affirmatively, conduct a more detailed inquiry in the judge's chambers or in the courtroom in the absence of the jury pool/panel. For a discussion of closing the courtroom in such circumstances, see Section 6.2.

♦ Consequences of Conviction and Sex Offender Registry

A court should not instruct jurors regarding the potential consequences or penalties (punishment) that may arise after the verdict. *People v Goad*, 421 Mich 20, 25-26 (1984). This prohibition also applies to questioning jurors

regarding the potential of a defendant having to register under the Sex Offender Registration Act (SORA) upon "conviction" of a "listed offense." *In re Spears*, 250 Mich App 349, 352-356 (2002). This is true even though registration under SORA has been held not to be a form of "punishment." *Id*.